

# **Effective Oral Advocacy in State and Federal Courts**

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## **I. Preparation for Oral Argument**

- A. What to do when you get the order setting the oral argument date
  - 1. Update your research; file notice of supplemental authority if appropriate.
  - 2. Review the briefs.
  - 3. Go to the court before the oral argument if you have the chance (either day of or in advance).
  - 4. Research your judge or panel.
  - 5. Set a schedule for your preparation.
- B. Getting Ready
  - 1. Very personal process – do what works for you.
  - 2. Goal of preparation
    - a. Know your arguments.
    - b. Know the other side’s arguments.
    - c. Be able to persuade the court to rule in your favor and to answer any questions from the court.
    - d. In trial court, if it is not a dispositive motion, it is another opportunity to educate the court about your case.
  - 3. Review briefing, legal authority, relevant facts
    - a. Know the critical cases thoroughly.
    - b. Know the facts relevant to the motion and where they are in the record.
  - 4. Prepare outline
    - a. Major “offensive points” – the reasons why you win.
    - b. Major “defensive points” – the reasons the other side is wrong.

- c. Prepare an introduction.
- 5. Develop your best answers to the toughest questions (always be prepared to address your weakest point).
- 6. Think about answers to questions likely to arise.
- 7. Talk through your argument.
- 8. Think of your argument in terms of themes or modules.
- C. To Moot or Not to Moot
  - 1. Deciding whether to moot (appellate yes, trial maybe).
  - 2. Who should be on a moot.
    - a. People familiar with case and the law.
    - b. Not just “true believers” for significant arguments.
    - c. People who will offer constructive comments.
  - 3. Structure of a moot court.
    - a. Exhaust the questions of the moot court panel.
    - b. Provide feedback.
  - 4. Informal “talk throughs.”
    - a. Not a formal moot but provides an opportunity for person arguing the case to present his or her plan and get feedback.
    - b. Discuss potential questions and answers.
    - c. Discuss proposed introduction.
    - d. Discuss proposed outline and major points.
  - 5. Timing of moots/”talk through.”
    - a. For appellate argument, recommend a “talk through” with someone involved with the case about a week before oral argument.

- b. Moot court – depends on the importance of the case and the experience of the advocate – recommend at least one day between moot and argument.
  - 6. What you want out of your moot -- practice; constructive criticism, opportunity for you to get questions answered about issues of concern to you.
- D. After the moot court
  - 1. Polish argument.
  - 2. Modify introduction based on input.
  - 3. Review briefs and key cases.
  - 4. Finalize whatever you will take with you to the podium – don't take too much!
  - 5. If argument is out of town -- decide what you need to bring with you; travel the day before if possible.
  - 6. Continue to practice.
  - 7. The day of your argument -- eat something; do whatever you need to do to feel confident.
- E. Managing the Client
  - 1. Prepare client for possible answers to difficult questions and possible concessions about the limits of your argument.
  - 2. Help them understand the process -- questions don't necessarily reflect the judge's views or the majority's views.
- F. Dealing with the Press for High Profile Arguments
  - 1. Work with the Office/client to develop a plan.
  - 2. Do not get distracted from preparation.

## **II. Tips for Trial Level Oral Argument**

- A. Practical Tips
  - 1. Double check time and location.
  - 2. Be early.

3. Be aware of any local customs.

B. Introduction

1. Prepare a punchy opener that gives a road map for your argument.
2. Be prepared to get through none, some or all of what you have prepared.
3. In complex cases, consider focusing on part of your argument and leaving some for the brief (E.g., “In our papers, we argued X, Y, and Z. Today I plan to discuss X and Y, but am available for questions on any topic.”).
4. Lead with your strongest argument.

C. Factual Background

1. Be ready for any level of preparedness by the judge.
2. Consider asking whether a recitation of the facts would be helpful before launching into one.
3. Weave the facts into your answers to questions.

D. Responding to Questions

1. Try to answer yes or no questions with yes or no (and explain).
2. Avoid evasion.
3. Don’t misrepresent the record. (Related: politely and professionally correct any misrepresentations from the other side.)
4. If you don’t know, say so. Offer to brief the issue if the judge would like.
5. Don’t be afraid to pause before answering.
6. Transition smoothly between answering questions to arguing.
7. Use questions to pivot to your good arguments.
8. Don’t go down rabbit holes (ok to answer I don’t know to an irrelevant question).
9. Concede only what you must to retain credibility. (Related: point out and build on concessions from the other side.)

10. Don't assume all questions are hostile.
- E. Using Visual Aids and Technology
1. Consider carefully whether to use visual aids, including Power Point.
  2. If you choose to incorporate a presentation, make sure it does not become a crutch.
  3. Deposition excerpts – probably more effective to refer to briefing than to read/play.
- F. Time Management
1. Practice and know your personal tendencies (e.g. do you speed up when you are nervous?)
  2. Think of your argument in timed chunks.
  3. Have more material than you think you will need/be prepared to jettison.
  4. If you are the movant, decide whether you want to reserve any time. Some/most judges will let you respond even if you run through all your time in your first argument.
  5. Put a watch/silenced cell phone on the podium where you can see it inconspicuously.
  6. Don't feel like you have to use all your time. End with a strong statement of what you want the court to do.
- G. Role of Second Chair
1. Know the record.
  2. Help locate documents, but don't interfere during argument.
  3. Take notes, focused in particular on rebuttal.
  4. If client is present, be the point of contact during argument.
  5. Avoid facial expressions/dramatic eye rolling.

### **III. Tips for Appellate Oral Argument**

- A. Answer the hard questions.
1. "That's not this case" is not good enough.

2. If you don't know the answer, say so.
  3. If you're not sure of answer give it your best shot but qualify the response as appropriate.
- B. Know the rule you want the court to adopt or apply
1. Use that language throughout the argument.
  2. Know the limits of this rule and how it would apply to other cases, if it is a new rule.
  3. Be able to talk about the policy implications of the rule – why it makes sense to apply it here.
- C. Know what points you can – or cannot – concede
1. This is part of knowing the rule you want the court to adopt or apply.
  2. Good to work this out in advance – perhaps with client.
  3. Don't undermine your case by making concessions that destroy your rule.
  4. Make concessions when you do not need to win the point to win the case.
- D. Use your time efficiently to make the points you need to make and answer the court's questions
1. Get to the point quickly through an effective introduction.
  2. Give yes or no answers – then follow with the detail necessary to defend that answer. Preferably one sentence of detail will suffice unless there are follow up questions.
  3. Answer questions and then transition to the points you want to make.
  4. Welcome questions – answering questions is more important than any prepared comments.
  5. If you are winning, sit down. Related: if you are losing, curtail your argument; try to focus on specific points rather than recapping your brief.
- E. Know your record and the law thoroughly – have appropriate “cheat sheets” for easy reference.
1. Know what is in the record and where it is in the record so you can direct the court quickly to the point in the record that answers a question.

2. Know the key language from critical cases.
  3. Know key language of statutes and rules relevant to the case.
- F. Be courteous to the court and opposing counsel
1. Listen to questions and give direct answers.
  2. Questions from the court take priority over anything you have prepared in advance – including your introduction.
  3. Correct errors of opposing counsel but do so respectfully
  4. Be respectful of the lower court if appellant.
- G. Role of second chair during appellate argument
1. Do anything arguing counsel wants you to do.
  2. Know where things are so you can find things in the record or the briefs at argument.
  3. Do not pass notes while lead counsel is arguing.
  4. Note issues for possible rebuttal.

#### **IV. Tips for Appellant/Appellee**

##### **A. Appellant's Rebuttal ---**

1. Limit rebuttal to a few critical points; most of your points should have been covered in your main argument.
2. Listen to the other appellee's argument and court's questions to prepare rebuttal points.
3. If there's nothing you need to say for rebuttal, say you have nothing further.

##### **B. Appellee**

1. Integrate responses to points made during appellant's argument but generally stick with your overall plan.
2. Listen to appellant and to court so you can integrate points into your presentation.

**V. After the Argument**

- A. Inform client – caution that argument does not necessary reflect how the court will rule.
- B. Move on.
- C. Responding to press calls – follow process established by Office/client; typically response explains your position and indicates that you are awaiting the decision of the court.